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JAMES R. BROWNING, Clerk

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 716

CONSTANTINE MACRIS,

*Petitioner,*

*against*

SOCIEDAD MARITIMA SAN NICOLAS, S.A., and PETMAR AGENCIES, INC., also known as P. D. MARCHESSINI and CO. INC.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
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*Proctor for Petitioner.*

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# Supreme Court of the United States

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Constantine Macris, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, entered on the 20th day of November, 1959, affirming the order of Hon. Edmund L. Palmieri, United States District Judge for the Southern District of New York, dated January 12, 1959.*

---

*Defendants having moved this Court for a summary judgment, dismissing the complaint herein under Rule 12(b) of the Federal Rules of Civil Procedure, pursuant to notice of motion dated, November 11, 1958, and said motion having duly come on to be heard before the Honorable Edmund L. Palmieri at a motion part of this Court, in the United States Court House, Foley Square, City and State of New York on the 30th day of December, 1958 and the Court having read the affidavit of Paul M. Jones, sworn to the 11th day of November, 1958 in support of said motion and the affidavit of

## Official Report of the Court Below

The opinion of the United States Court of Appeals for the Second Circuit has been officially reported at 271 F. 2d 956. Appendix (p. 7).

## Jurisdiction

The opinion of the court below was filed on November 20, 1959.

Jurisdiction to review this decision is predicated upon Title 28, U. S. C., Section 1254, *et seq.*

## Questions Presented

Does the refusal of a trial court to permit the incorporation of an additional cause of action than that pleaded in the complaint, predicated upon a separate and distinct tort and breach of warranty of seaworthiness, constitute *res judicata* on the basis that the cause of action could originally have been pleaded as an additional cause in the same complaint, as decided by this Honorable Court in the

---

Irwin Asofsky, sworn to the 2nd day of December, 1958, in opposition thereto, and the Court having heard the attorney for defendants in support of said motion and the attorney for plaintiff in opposition thereto and due deliberation having been had thereon,

Now, on the motion of Giallorenzi & Cichanowicz, attorneys for defendants, it is

ORDERED, that the defendants' motion for summary judgment be and the same hereby is granted and it is hereby further,

ORDERED, that the complaint be and the same hereby is dismissed, and that judgment be entered herein by the Clerk in favor of defendants and against plaintiff.

Dated: New York, New York,
January 12, 1959.

/s/ EDMUND L. PALMIERI,
*U. S. D. J.*

case of *Angel* v. *Bullington*, 330 U. S. 183, 67 S. Ct. 657, or does the fact that the cause of action had never been pleaded and actually disallowed as an amendment to a complaint and never tried on the merits, leave such cause of action unaffected and does not impair the petitioner's substantive right as decided by the cases of *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 160, 52 S. Ct. 571, 576 and *Dalton* v. *Webster*, 82 N. C. 279?

Is a judgment considered to be upon the merits over a cause of action not pleaded, but which could have been pleaded jointly in a complaint by a separate and distinct cause of action predicated on a separate and distinct event from that actually pleaded and tried, or is it to be considered not on the merits, as falling within the holding in the case of *Stoll* v. *Gottlieb*, 305 U. S. 165, 59 S. Ct. 134?

## Reasons for Granting the Writ

The petitioner was not afforded a trial as to a distinct and separate cause of action, on the basis that an action predicated on a separate and distinct event constituted *res judicata*.

It seems that the court below has erroneously interpreted the decision in the case of *Angel* v. *Bullington*, *supra*, as a basis for holding that a decision on a cause of action predicated on a separate and distinct event constituted *res judicata* as to all causes of action predicated on separate and distinct events which could have been joined in the same complaint.

It would be most important for seamen to be educated and informed as to their rights by this Honorable Court as to whether or not they are duty bound to assert all existing claims for any and all accidents against one shipowner in one complaint at the penalty of having one cause of action as to one event constitute a bar to any cause of action predicated on separate and distinct events or accidents involving the same shipowner.

There seems to be a conflict of decision by the court below in the case at bar and the decisions in the cases of *Bradford Electric Light Co.* v. *Clapper, supra; Dalton* v. *Webster, supra,* and *Stoll* v. *Gottlieb, supra.*

There seems to be an erroneous application of the law by the court below in conflict with that stated in the prevailing opinion by Mr. Justice Frankfurter in the case of *Angel* v. *Bullington, supra.*

## Statement

The petitioner suffered extremely serious and permanent injuries as a result of an accident on the 8th day of January, 1952.

He suffered a traumatic injury through the negligent acts of the shipowner, as well as its breach of warranty of seaworthiness.

Thereafter, and during the course of a subsequent voyage, the petitioner required treatment (concededly for the effects suffered in the aforesaid accident), which treatment was delayed until after August 11, 1952.

A complaint was served predicated solely and exclusively on the basis of failure to treat.

There can be no denial about this being the sole cause of action and that the cause of action predicated on the accident was not allowed by the trial court as an amendment.

This was specifically stated by Hon. Lawrence E. Walsh, Judge of the District Court for the Southern District of New York, in a decision dated December 31, 1955, reported in 19 Fed. Rules, Decisions, p. 397, affirmed 245 F. 2d 708, c. d. 353 U. S. 922, 78 S. Ct. 364:

> "Plaintiff did offer proof of the prior events at Bremen and Santos, but this proof was received

> solely upon the issue of defendants' duty subsequent to re-employment in Baltimore—not as to possible fault of the defendants in Bremen or between Bremen and Baltimore. Defendants objected to its receipt for any purpose. Plaintiff acquiesced in the Court's limitation. He did not at that time seek to amend his complaint.
>
> Plaintiff's motion to amend, at the close of the trial, was made under Rule 15 (b), as a motion to conform the pleadings to the evidence. This was not a proper case for amendment under Rule 15 (b) because proof had not been taken as to the claim attempted to be added to the complaint, except as incidental to other matters."

The court below held that the said decision by Judge Walsh constituted *res judicata*. We submit that the above excerpts establish the fact that it was not *res judicata* and that the court below was in error in so holding.

The question of laches raised a factual issue and therefore we do not feel that this is legally proper or factual material in this petition.

It is important to the merchant marine industry to be instructed as to what would constitute *res judicata* in the event seamen had more than one cause of action against the same shipowner, as well as important to have what appears to be an incorrect interpretation of the law pertaining to seamen, corrected by this Honorable Court.

## CONCLUSION

**For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.**

Respectfully submitted,

JACOB RASSNER,
15 Park Row,
New York 38, N. Y.,
*Proctor for Petitioner.*

# APPENDIX

## Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 35, Docket 25593.

Submitted Nov. 5, 1959

Decided Nov. 20, 1959

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CONSTANTINE MACRIS,

Plaintiff-Appellant,

v.

SOCIEDAD MARITIMA SAN NICOLAS, S.A., and PETMAR AGENCIES, INC., also known as P. D. MARCHESSINI AND CO., INC.,

Defendants-Appellees.

---

Before CLARK, *Chief Judge*, and HINCKS and WATERMAN, *Circuit Judges*.

PER CURIAM.

This is a seaman's action brought on October 9, 1958 under the Jones Act, 46 U. S. C. A. § 688, and general maritime law to recover for an injury sustained aboard ship in Bremen on January 8, 1952 when the plaintiff allegedly was improperly ordered to pull on a rope and as a result his "strength was overtaxed." Recovery is also sought for aggravation of the plaintiff's injury suffered in the ensuing voyage from Bremen to Baltimore.

The court below granted the defendants' motion for summary judgment which raised the defenses of *res judicata*, statute of limitations, and of laches. The undisputed mo-

tion papers showed the following facts. A prior action had been brought in 1952 by the same plaintiff against the same defendants or their privies to recover for the aggravation of the injuries sustained in Bremen in January 1952 which occurred during a voyage subsequent to the Bremen-Baltimore voyage. After an adverse decision on the merits at the close of the plaintiff's case, the plaintiff had thereupon moved for leave to amend his complaint to allege as additional grounds of recovery the basic injury in Bremen and its aggravation in the Bremen-Baltimore voyage. This motion was denied in an opinion reported in D. C., 19 F. R. D. 397 and judgment was entered on January 18, 1956 dismissing the plaintiff's complaint except for the count based on claimed maintenance and cure. This judgment was affirmed on appeal, 2 Cir., 245 F. 2d 708, and certiorari was denied, 355 U. S. 922, 78 S. Ct. 364, 2 L. Ed. 2d 353.

The action below granting the defendants' motion for summary judgment was plainly right. The prior action had been unequivocally and finally dismissed on the merits, even though the plaintiff had selected as the only ground of appeal the denial of the motion to amend. Since the claim raised in the pending case, if the plaintiff had seasonably chosen to do so, might have been presented in the prior action and was indeed part of the same claim, the defense of *res judicata* was good. Angel v. Bullington, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832; Williamson v. Columbia Gas & Electric Corp., 3 Cir., 186 F. 2d 464, certiorari denied 341 U. S. 921, 71 S. Ct. 743, 95 L. Ed. 1355. Cf. Moore's Federal Practice 2.06 [6].

Moreover, the action below, which had been brought not until over six years subsequent to the date of the plaintiff's alleged injury, was time-barred. The claim under the Jones Act was barred by 45 U. S. C. A. § 56. The claim under the general maritime law, at least in view of the plaintiff's conduct set forth in our earlier opinion, was

barred by laches. LeGate v. The Panamolga, 2 Cir., 221 F. 2d 689.

Nor does Section 23 of the New York Civil Practice Act relieve the plaintiff from the time-bar. For that section, even assuming its general applicability to federal cases such as this, is at most applicable to permit the commencement of "a new action for the same cause." And if the present action be deemed one "for the same cause," the situation does not fall within Section 23. For the earlier action "for the same cause" went to judgment on the merits and was not terminated, as prescribed by Section 23, "in any other manner than by * * * a final judgment upon the merits."

Affirmed.

**Judgment**

## UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of November, one thousand nine hundred and fifty-nine.

Present:

HON. CHARLES E. CLARK,
*Chief Judge,*

" CARROLL C. HINCKS,
" STERRY R. WATERMAN,
*Circuit Judges.*

---

CONSTANTINE MACRIS,
Plaintiff-Appellant,

v.

SOCIEDAD MARITIMA SAN NICOLAS, S.A., and PETMAR AGENCIES, INC., also known as P. D. MARCHESSINI AND CO., INC.,
Defendants-Appellees.

---

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

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# BRIEF OPPOSING CERTIORARI

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MAR 14 1960
JAMES R. BROWNING, Clerk

# Supreme Court of the United States

**OCTOBER TERM, 1959**

**No. 716**

CONSTANTINE MACRIS,

*Petitioner,*

—against—

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*Respondents.*

## BRIEF OPPOSING CERTIORARI

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## STATUTES CITED


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# Supreme Court of the United States

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---

## BRIEF OPPOSING CERTIORARI

### Questions Presented

Respondents disagree, completely, with the Petitioner's statement of the Questions Presented for review (Pet. pp. 2, 3) and respectfully submit that the Petition presents, in fact, the following questions only:

1. Is the defense of *res judicata* valid where the Petitioner failed to include in the complaint in a prior action a claim which might have been presented in the original suit?

2. Should certiorari be granted and the Petitioner permitted to pursue a second suit where the complaint shows on its face that the claim is barred both under the Jones Act, 45 U. S. C. §51 and by Petitioner's laches?

## Statement

Petitioner's complaint in his previous action was based upon an alleged factual background of an aggravation of a previously impaired physical condition while serving on board the "S. S. Euryviades" from April 7, 1952 when he signed-on the vessel at Baltimore, Maryland until July 7, 1952. That action went to trial without a jury on issues joined on those allegations, and there was a judgment for the Respondents as to liability but granting Petitioner maintenance and cure (Pet's. App. pp. 8a, 9a, 25a, 26a). The memorandum decision of the District Court in the previous action (found at pages 20a-24a of Petitioner's Appendix) explicitly shows that the facts of Petitioner's present cause were known to him.

During the pendency of the previous action, facts had been developed by an affidavit of Petitioner in an application for a trial preference and by his examination before trial that he had suffered a hernia while serving on said vessel prior to the times put in issue by his previous complaint. This injury occurred in the port of Bremen, Germany on January 8, 1952, after Petitioner had signed-on said vessel at Pireaus, Greece, in November of 1951. Petitioner received medical attention and, later on, when the vessel arrived at Baltimore, on April 2, 1952, he signed-off the vessel, but refused repatriation to Greece and, on April 7, 1952, signed-on again (Pet's. App. pp. 9a-11a). These are the periods of time incorporated in the present complaint of Petitioner.

The facts as to the events prior to April 7, 1952 were not in issue in the previous trial because Peti-

tioner consistently refused to put them in issue, but limited his claims to aggravation of his condition after reemployment at Baltimore. Proof of events prior to reemployment at Baltimore were received by the Court over Respondents' objection, and solely upon the issue of Respondents' duty subsequent to reemployment, and Petitioner acquiesced in this limitation (Pet's. App. pp. 13a, 20a-24a). After adverse decision, Petitioner moved to broaden his pleadings to assert Respondents' liability for the original hernia in Bremen, Germany, on January 8, 1952. That motion was denied, as was a motion for reargument (19 F. R. D. 397). Judgment was then entered (Pet's. App. pp. 25a, 26a), which judgment was affirmed by the Court of Appeals for the Second Circuit (245 F. 2d 708); certiorari was denied by this Honorable Court (355 U. S. 922).

The decision of the District Court in the prior action was rendered on October 31, 1955 and the decision denying the motion to reargue was rendered on December 31, 1955. The judgment in the prior suit was entered on January 18, 1956, which judgment was affirmed by the Court of Appeals for the Second Circuit on June 17, 1957; certiorari was denied by this Honorable Court on January 13, 1958.

The present action was commenced on October 9, 1958 (Pet's. App. 1a).

## ARGUMENT

### POINT I

**The controversy sought to be litigated is res judicata.**

Petitioner (Pet. pp. 3, 5) seeks to infer that it is necessary for seamen to be educated and informed by this Honorable Court with regard to whether or not they are duty-bound to assert all existing claims against the shipowner in one complaint.

This Honorable Court has long since answered that inquiry in the affirmative when it held in *Baltimore Steamship Company* v. *Phillips*, 274 U. S. 316, as follows at page 319 and at page 322:

> "The effect of a judgment or decree as res judicata depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. * * *
>
> The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist and upon which he relied, and cannot be permitted, as was

attempted here, to rely upon them by piecemeal in successive actions to recover for the same wrong and injury. * * *".

It is submitted that Petitioner has already had his day in court and that under the circumstances the action which he now seeks to pursue has been litigated and is res judicata.

The Court of Appeals for the Second Circuit in an opinion written by Associate Justice of this Court Potter Stewart in the previous action brought by Petitioner against Respondents (245 F. 2d 708, 710-11) clearly indicated that Petitioner had in fact deliberately limited the issues which he chose as the basis for the first action, writing as follows:

> "Maeris' cause of action for negligence and unseaworthiness was based upon a clear cut and narrowly defined theory. The complaint was silent as to what had transpired before Maeris decided to resume his employment in Baltimore. It alleged that he 'signed articles' as second mate there on April 7, 1952. Recovery was sought upon the ground that his impaired physical condition at the time of his employment in Baltimore had been aggravated by the defendants' negligence and by the unseaworthiness of their vessel during the ensuing three month period. The claim was that this aggravation made necessary two operations instead of one and thereby caused his subsequent disability.
>
> After a five day trial the district judge found that this cause of action had not been proved. The court found as a matter of fact that Maeris' condition had not deteriorated during the period

between April 7, 1952, when he signed the articles in Baltimore, and July 7, 1952, when he left the ship in California." * * *

At the trial the history of what had occurred from the time Macris was originally employed in Greece was received in evidence, despite the narrow scope of the complaint. Defense counsel repeatedly objected to the admission of any evidence of events prior to Macris' reemployment in Baltimore, and the evidence was admitted by the trial judge only for the limited purpose of showing 'the course of dealings between the parties before the hiring' at Baltimore.

At the close of the plaintiff's case, his counsel made a perfunctory motion 'to amend the pleadings to conform to the proof' but failed to point out any variance between the evidence and the pleadings, or any change in the theory of the plaintiff's cause of action. When the trial judge inquired as to the reason for the motion, counsel replied, 'Frankly, I don't see any actual need at the moment.' The court denied the motion with leave to renew it at a later time. The motion was not renewed until after the court had announced an adverse decision. Only then did counsel indicate that he desired to broaden his pleadings to assert the defendants' liability for the original hernia in Bremen and for its aggravation during the voyage from Bremen to Baltimore.

The court denied the motion upon the ground 'that no such issues had been tried by the express or implied consent of the parties, pointing out that 'proof had not been taken as to the claim attempted to be added to the complaint' except 'upon the issue of defendants' duty subsequent to reemployment in Baltimore,' and that the de-

fendants had objected to its receipt for any purpose. The court pointed out that plaintiff's counsel had had ample opportunity to familiarize himself with the facts of the case and had deliberately chosen the theory on which he intended to proceed. The court emphasized that plaintiff's counsel had 'badgered' his opponent with the possibility of such an amendment as part of a 'war of nerves,' but had refrained from asking to amend until the case had been lost on the plaintiff's original theory.

Under the circumstances disclosed by the record, the trial court was clearly within its discretion in denying the motion to amend. * * *

The denial of the motion to amend was not prejudicial in any event, however, for the simple reason that the evidence failed to show any breach of duty to Macris on the part of the defendants prior to the ship's arrival in Baltimore. There was no proof that unseaworthiness of the vessel or the defendants' negligence was a cause of Macris' original injury at Bremen. There was no proof that aggravation of his condition between Bremen and Baltimore was so caused. There was no proof of any negligent failure to provide Macris with medical treatment either before or after the vessel stopped at Baltimore, and there was affirmative evidence, and an affirmative finding that there had been no such failure."

For the reasons set forth in the above mentioned opinion, the Court of Appeals very properly held, in considering the action subsequently instituted by Petitioner which is now before this Court, that "* * * the defense of res judicata was good." (App. to Petition, p. 8).

The Petitioner failed to litigate all of the issues which might have been raised, even though at the time of the original suit they were well known to him, and under such circumstances final judgments or decrees become res judicata and are conclusive between the parties and their privees as to all issues which were raised or might have been litigated in the suit in which they were rendered. *Angel* v. *Bullington*, 330 U. S. 183; *Williamson* v. *Columbia Gas & Electric Corp.*, (3d Cir. 1950) 186 F. 2d 464; cert. denied, 341 U. S. 921.

The District Court allowed the Petitioner in the previous action to introduce testimony of events prior to April of 1952, which evidence was admitted by the Court solely upon the issue of Respondents' duty subsequent to reemployment in Baltimore. (19 F. R. D. 397, 398; Pet's. App. 13a). Both the District Court and the Court of Appeals in the prior action found that the evidence failed to show any breach of duty to Petitioner on the part of the Respondents prior to the ship's arrival in Baltimore, whether predicated upon negligence or upon unseaworthiness, and whether referring to the causation of his injury, its aggravation, or the medical treatment afforded it (Pet's. App. 45a). It is clear, therefore, that even though evidence was introduced for a limited purpose in the prior suit with regard to the occurrence in Bremen, it was found that the occurrence did not in any manner whatsoever create liability on Respondents' part.

It is submitted therefore that this controversy is res judicata.

## POINT II

### The action is time-barred.

Petitioner's complaint (Pet's. App. pp. 2a-6a) sets forth a seaman's action based upon the Jones Act and unseaworthiness, and for maintenance and cure in connection with an alleged accident which occurred to Petitioner on January 8, 1952. The instant action was commenced on October 9, 1958, well over six years after the alleged occurrence (Pet's. App. pp. 1a, 3a).

Insofar as Petitioner claims under the Jones Act, the action is time-barred under the substantive limitation of Title 45, U. S. C. 56, which requires that the action be brought within three years.

The claim is likewise time-barred under the general maritime law because of Petitioner's laches.

In *LeGate v. The Panamolga*, (2d Cir. 1955) 221 F. 2d 689, the Court of Appeals in ruling upon the question of laches in a suit by a longshoreman for personal injuries for negligence and unseaworthiness held that the district court properly placed the burden of explaining away laches upon the libelant, as to negligence, because the suit had been commenced over three years after the occurrence, under the analogous Section 49(6) of the New York Civil Practice Act, and stated (p. 690):

> "* * * if negligence were the only basis of the liability asserted, since the libelant failed to show special circumstances excusing the delay the claim would be barred."

In ruling upon the claim for unseaworthiness, in the *LoGate* case, supra, the Court applied the analogous six-year limitation of Section 48(3) of the New York Civil Practice Act.

As appears from the record in the instant matter, the present suit was commenced on October 9, 1958, for an injury occurring in Bremen, Germany on January 8, 1952 (Pet's. App. pp. 1a, 3a). The action was, therefore, commenced well over six years from the date of the occurrence. Accordingly, the burden is upon Petitioner to explain away his laches, which he has failed to do.

It is submitted that this controversy is time-barred.

## CONCLUSION

**The petition for certiorari should be denied.**

Respectfully submitted,

JOHN H. DOUGHERTY,
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RENATO C. GIALLORENZI,
*Of Counsel.*